B. Glendale Qualifications Issues

1. Raystay's LPTV Extension Applications

694. The record establishes that Raystay Company, with the knowledge and participation of George Gardner, made false and misleading statements in eight different LPTV extension applications filed with the Commission in December 1991 and July 1992. The applications misrepresented Raystay's construction intentions, failed to disclose the true reasons why no construction had occurred, falsely implied that nobody but Raystay was interested in developing the permits, falsely implied that its own "engineer" had inspected the sites, misrepresented other material facts concerning Raystay's construction efforts, and concealed the fact that Raystay was actually trying to sell the construction permits. Raystay's undisclosed reason for extending the permits was to realize their sale value, either combined with TV40 (whose marketability Gardner believed the permits enhanced) or sold separately to recoup Raystay's costs. The motive for deceiving the Commission is apparent: the extensions would have been ungrantable under Commission policy if Raystay had told the truth.

a. The Criteria for Grant of Extensions

695. In 1985 the Commission adopted strict criteria for the extension of unbuilt broadcast construction permits because it was "seriously concerned" that the filing of extension

applications was delaying the activation of new broadcast service to the public. Amendment of Section 73.3598, 102 FCC 2d 1054, 1055 (1985). Extensions would be granted, said the Commission, only if: (a) construction were already completed; or (b) the permittee had made substantial progress toward completion of construction; or (c) no progress had been made for reasons "clearly beyond the control of the permittee" but the permittee had taken "all possible steps to expeditiously resolve the problem and proceed with construction." Id. at 1055-56; 47 C.F.R. §73.3534(b). Moreover, under long-standing policy, the Commission would not grant an extension merely so a permittee could assign its construction permit. Golden Eagle Communications, Inc. 6 FCC Rcd 5127, 5129 (¶11) (1991); Rappaport Communications, Inc., 2 FCC Rcd 175 (1987); Greenfield Television, 2 FCC Rcd 4332, 4333 (MMB 1987); Continental Summit Television Corp., 27 FCC 2d 945, 948 (Rev. Bd. 1971); David E. Goff, 100 FCC 2d 1329, 1330 (MMB 1985).

696. The Commission has repeatedly made clear that no extension is warranted if the permittee has failed to construct because it has made a "private business judgment not to proceed." Panavideo Broadcasting, Inc., 6 FCC Rcd 5259 (¶4) (1991); Community Service Telecasters, Inc., 6 FCC Rcd 6026 (1991). Deferral of construction "solely because of economic considerations" is deemed to be an "independent business judgment" and not a circumstance beyond the permittee's control.

Rock City Broadcasting, Inc., 52 FCC 2d 1246, 1247 (Rev. Bd. 1975).

697. Specifically, the Commission will deny an extension if the permittee is simply awaiting developments to determine if the proposed station would be economically viable. Tex-Ark TV Company, Inc., 38 FCC 2d 650, 651 (Rev. Bd. 1972) (waiting for local cable carriage); The Jackson Television Corporation, 23 FCC 2d 321 (1970) (waiting for a network affiliation); Radio Longview, Inc., 19 FCC 2d 966, 971 (waiting for a network affiliation); Community Telecasters of Cleveland, Inc., 58 FCC 2d 1296, 1298-1300 (Rev. Bd. 1976) (waiting to see proposed new CATV rules re importation of competing signals).

698. Where the permittee has already received an extension, any application for further extension is judged according to the "progress made during the most recent construction period." Panavideo Broadcasting, Inc., supra, 6 FCC Rcd at 5259 (¶4); Golden Eagle Communications, Inc., supra, 6 FCC Rcd at 5129 (¶10); Metrovision, Inc., 3 FCC Rcd 598, 602 (¶23) (MMB 1988); New Dawn Broadcasting, 2 FCC Rcd 4383 (MMB 1987). The Commission will want to see "substantial and sustained progress" that is "evident from one extension period to the next." Benko Broadcasting Company, 5 FCC Rcd 1301, 1303 (¶15) (MMB 1990).

699. Finally, the Commission has expressly stated that "implicit in the filing" of an LPTV extension application is "an intent to construct a station and commence service." Low Power

Television Service, 51 RR 2d 476, 517 (1982). Thus, a permittee seeking an extension is implicitly representing to the Commission that, despite its failure to construct so far, it has a firm present intent to proceed with construction. In the Commission's view, efforts to sell the construction permit belie an intent to construct and are grounds for denying an extension. Telemusic Company, 4 FCC 2d 221, 222-23 (1966); Gross Broadcasting Co., 26 FCC 2d 306, 311 (Rev. Bd. 1970) ("willingness to sell the construction permit" indicates that permittee "does not intend to construct"); Hasler Productions, Inc., 1 FCC Rcd 811, 813 (MMB 1987) ("you have attempted to assign the construction permit, evidencing an intention to dispose of your authorization rather than to build the station").

700. In light of these well-settled policies, Raystay needed to convey two false impressions in Exhibit 1 to induce the Commission to grant the extensions: first, the impression that Raystay would build the stations if the applications were granted; and second, the impression that Raystay was currently actively working toward construction. To convey those impressions, Raystay had to conceal the following critically relevant facts: that Raystay lacked a viable business plan and did not intend to build the stations without one; that no construction funds were budgeted; that Raystay was precluded by agreement with its lender from spending money on the project; that Raystay deemed local cable carriage essential to the economic viability of the stations; that it would not proceed without commitments

from cable operators, which it could not get; that it was trying to sell TV40, which it had originally considered would be the hub of its regional LPTV system; that it regarded the new permits to be of no use without TV40; and that it wanted to extend the permits to keep them available for a prospective buyer. In short, to gain the desired extensions Raystay had to avoid telling the Commission the one fundamental and undeniable truth: that the failure to start construction was entirely a matter of Raystay's private business judgment not to construct.

b. Raystay's False Submissions Are Disqualifying

701. Raystay committed disqualifying misconduct when it misrepresented its intentions and failed to disclose the true reasons why there had been no construction. The deception lay at least as much in what Raystay did not tell the Commission as in what it did say. In comparable circumstances, the Commission in KQED, Inc., 5 FCC Rcd 1784 (1990), disqualified a San Francisco television licensee for misrepresentations and lack of candor in Commission filings about the reasons why its station had gone dark for several months. The licensee's filings had implied that the shut-down was required for technical reasons, when in fact the licensee had suspended operation for budget and financial reasons.[105/] The Commission concluded:

105/ Like Raystay's extension applications in the present case, the licensee's filings in KQED (in the words of the Review Board) "paint a picture at sharp variance with the full circumstances pertaining at KQEC." KQED, Inc., 3 FCC Rcd 2821, 2822 (continued...)

> "KQED did not accurately represent the reasons that the station was off the air, and misled the Commission as to KQED's intentions regarding the station and the role that budgetary considerations played in KQED's actions. Such conduct violates the fundamental duty of a licensee to deal honestly with the Commission." 5 FCC Rcd at 1784-85.

702. Raystay committed exactly the same disqualifying offense. Raystay did not accurately represent the reasons why no construction had occurred, it failed to disclose the role economic considerations had played, and it misled the Commission about its construction intentions. As in KQED, Raystay's Exhibit 1 "paint[ed] a picture at sharp variance" with the true facts and circumstances. Where statements to the Commission are materially misleading in context, it is no defense that they are literally accurate. Disqualification is warranted "if the applicant withholds important information from the Commission or otherwise tries to create impressions designed to mislead the Commission -- even in pleadings containing statements that are 'technically' correct but misleading as to the known state of facts." RKO General, Inc. (WNAC-TV), 78 FCC 2d 1, 98 (1980) (emphasis added), aff'd sub nom. RKO General, Inc. v. FCC, 670 F.2d 215 (D.C. Cir. 1981), cert. den. 456 U.S. 927 (1982).[106/]

[105/](...continued)
(¶6) (Rev. Bd. 1988) (emphasis added). "The internal activities at KQEC...were not revealed in KQEC's contemporaneous reports to the Commission." Id. at 2824 (¶13) (emphasis added).

[106/] See also, Christian Children's Network, Inc., 61 RR 2d 989, 992 (Rev. Bd. 1986) (applicant disqualified for making filings designed to convey "misimpression" that applicant presently held certain assets).

703. Moreover, key representations in Raystay's Exhibit 1 could not even be called "technically correct" -- they were flatly false. For example, there was no truth at all to the claim that Raystay had "entered into lease negotiations" with the transmitter site owners. In no sense did the 60-second telephone call to each site, even as David Gardner described them, constitute "lease negotiations." In 62 Broadcasting, Inc., 3 FCC Rcd 4429, 4449 (¶117) (ALJ 1988), a similar statement asserting that "negotiations are in process" was held to be false where "no negotiations were taking place" because the site owner had made a non-negotiable demand that had to be met before there could be any discussion of "the terms and conditions" for the use of the proposed tower. Here, there was no discussion of "terms and conditions" in the 60-second telephone calls, and no negotiations were taking place when Raystay filed Exhibit 1 in December 1991 and again in July 1992.[107/]

704. Also false was Raystay's claim that it was engaged in "continuing negotiations" with local cable operators about carriage of the LPTV stations. Harold Etsell, the person who had been charged with developing Raystay's business plan for the unbuilt LPTV stations and the only credible witness on the

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107/ Without reaching the question of disqualification (since the application was being denied anyway on other grounds), the Review Board observed in Channel 62 that disclosure of the facts actually known to the applicant when she filed "would have ineluctably revealed that she had filed under false colors." Channel 62 Broadcasting, Inc., 4 FCC Rcd 1768, 1773 (¶25) (1989).

subject, had ceased having such discussions with cable operators many months earlier. Furthermore, even crediting the Gardners' claims that they spoke to cable operators at conventions in the fall of 1991 and January 1992, those conversations did not constitute "negotiations." They were at best brief encounters where Raystay took the opportunity to remind the cable operators that it remained interested in cable carriage for its prospective new LPTV stations. Moreover, there is no reliable evidence that any such conversation occurred after January 1992. Hence, when Raystay filed the second extension applications in July 1992, the claim that "negotiations" with cable operators were "continuing" was plainly false.

705. The Presiding Judge has asked the parties to brief the question of whether an applicant lacks candor when it fails to provide information specifically requested by the Commission. (Tr. 5342-43.) Triggering that question is Raystay's failure to have stated (in response to Instruction F of Form 307) either the "reasons for delays in commencement or completion of construction" or the "detailed steps being taken to remedy delays."

706. The Presiding Judge's question is clearly answered by Telephone and Data Systems, Inc., 9 FCC Rcd 938, 945 (1994) where the Commission held that there is lack of candor when an applicant fails to provide "all facts and information relevant to a matter before the FCC, whether or not such information is

particularly elicited" (emphasis added). In this case, Raystay withheld relevant information that was specifically elicited by Form 307 (i.e., the reasons why construction had not commenced).[108/] Raystay's motive for not providing the requested information is apparent: a candid statement of the reasons would have doomed Raystay's applications. To avoid dooming its applications, Raystay avoided responding to that particular question. Its nonresponse was a deliberate act of concealment, particularly egregious because it was coupled with statements designed to convey a false impression about Raystay's construction intentions. Under Telephone and Data Systems, Inc., this nonresponse was clearly a lack of candor.

c. The Misconduct Disqualifies George Gardner

707. George Gardner must be disqualified for Raystay's misconduct for three reasons: (1) because he himself was a knowing participant in the misconduct; (2) because, as controlling owner of the licensee, he was obligated under Commission policy to ascertain the facts and report truthfully; and (3) because, as controlling owner of the licensee, he is accountable

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[108/] By implying that Raystay was involved in "negotiations" and other pre-construction activities, Exhibit 1 did purport to give an answer about "steps being taken to remedy delays," albeit without disclosing that the sole cause of delay was Raystay's business decision not to construct. Exhibit 1 also falsely implied that the reason construction was not completed was that the "negotiations" and other efforts were still in progress. Obviously misled by these representations, on which it relied (TBF Ex. 252), the Commission staff did not ask Raystay to submit additional information.

under Commission policy for the misconduct of his subordinates. Disqualification is particularly warranted here because the misconduct occurred after the Commission had placed Gardner under "heightened scrutiny" for similar misconduct in another proceeding.

(1) Gardner's Personal Involvement

708. As discussed above, George Gardner knew when he signed the LPTV extension applications, first in December 1991 and again in July 1992, that Exhibit 1 conveyed a materially false impression. Although Exhibit 1 plainly implied that Raystay intended to build the stations if the applications were granted and was actively working toward construction, Gardner knew otherwise. He himself had decided there was no viable business plan, without which "there was no way that I was going to go ahead" (Tr. 5270). He himself had decided not to budget any construction funds. He himself had resolved not to build without cable carriage. He himself was now trying hard to sell TV40, cut his losses, and get out of the failed LPTV business. And because he felt that the construction permits enhanced the sale value of TV40, he wanted to keep the permits available to offer to potential buyers.

709. In short, Gardner knew when he signed the applications that he had no present intent to construct the LPTV stations if the permits were extended. Rather than forthrightly disclose that to the Commission, he approved and signed repre-

sentations that upon plain reading gave the exact opposite impression. Gardner obviously knew the impression that Exhibit 1 was conveying, because the tenor of the words and phrases is clear to any reader. Moreover, Gardner is not unsophisticated. He has long experience both as a businessman and as a Commission applicant and licensee -- a relevant fact, now as before, in assessing his claim of good faith. RKO General, Inc. (WAXY-FM), 4 FCC Rcd 4679, 4684 (¶29) (Rev. Bd. 1989) ("As an experienced businessman and broadcaster, Gardner cannot avoid the consequences of his wrongful conduct on the excuse that he did not know what divestiture meant").[109/]

710. Nor is Gardner absolved here by his claim of reliance on counsel. Since Gardner knew that Exhibit 1 conveyed a materially false impression, the fact that counsel had prepared the document is no defense. Reliance on counsel will not save an applicant from disqualification where "the average person could readily appreciate the spuriousness" of the document counsel had prepared. Stereo Broadcasters, Inc., 87 FCC 2d 87, 103 (1981).[110/] Thus, if counsel proposes conduct that is

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[109/] See also, RKO General, Inc. (KFRC), 5 FCC Rcd 3222, 3224 (¶24) (1990) ("Zingale, an experienced broadcaster, who knew that the Commission had strict processing rules for LPTV, made no effort to determine whether the use of powers of attorney was appropriate"); Welch Communications, Inc., 7 FCC Rcd 4542, 4545 (¶17) (Rev. Bd. 1992) ("experienced broadcaster" disqualified for attempting to deceive Commission).

[110/] Gardner could readily appreciate the spurious overall impression conveyed by Exhibit 1. Beyond that, from his discussions with counsel about the Trinity negotiations, he knew (continued...)

obviously improper under well-known Commission standards, the licensee cannot claim that its resulting breach of duty is excused by reliance on counsel. RKO General, Inc. v. FCC, supra, 670 F.2d at 231 (disqualification affirmed where licensee acquiesced in misleading pleadings filed by counsel); WADECO, Inc. v. FCC, 628 F.2d 122, 128 (D.C. Cir. 1980) (disqualification affirmed where applicant with knowledge of the true facts failed to correct misstatements filed by counsel); Las Americas Communications, Inc., 6 FCC Rcd 1507, 1510 (¶21) (1991) (applicant disqualified because reliance on counsel "does not excuse intentional concealment of information" (citing WADECO)); Ponchartrain Broadcasting Company, Inc., 7 FCC Rcd 3264 (Rev. Bd. 1992) (upholding disqualification for submission of false statements where applicant acquiesced in attorney's misconduct).[111/]

(2) Gardner Was Obligated To Ascertain the Facts

711. Equally unavailing is any claim that George Gardner did not know particular statements in Exhibit 1 were inaccurate

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110/(...continued)
that counsel knew it was not true that "no other entity has expressed an interest in providing this service."

111/ The counsel upon whom Gardner claims reliance in this case also represented him in the RKO Fort Lauderdale case, where his commitment to "divest" was found uncandid. See, RKO General, Inc. (WAXY-FM), 4 FCC Rcd 4679, 4680-81 (¶11) (Rev. Bd. 1989); see also, Glendale Ex. 226, p. 3. In light of that history, Gardner had particular reason to question counsel about Exhibit 1 here, and not to embrace uncritically the representations in Exhibit 1 just because counsel had apparently approved them.

or untrue. A perfect example is the representation in Exhibit 1 that Raystay "has entered into lease negotiations" with the site owners. That statement, Gardner testified, "was reasonable to me because it was consistent with David Gardner's job responsibility," and Lee Sandifer had raised no question about it. (Glendale Ex. 208, p. 5.) The statement was in fact utterly false. Even assuming arguendo that George Gardner really was unaware of that, he is not exonerated.

712. It is well settled that licensees have a "duty to ascertain the facts" before submitting information on which the Commission "will rely as substantiated and accurate." Sea Island Broadcasting Corp. of S.C., 60 FCC 2d 146, 152-53 (1976). George Gardner completely abdicated that responsibility here. He made not the slightest effort to verify what he was signing -- something he could have done very simply by asking David Gardner, "What lease negotiations?" Had he bothered to ask that question, he would have quickly learned that the claimed "lease negotiations" were a fiction.

713. By failing to verify the statements he was signing, George Gardner acted at his peril. In Golden Broadcasting Systems, Inc., 68 FCC 2d 1099 (1978), the Commission disqualified a licensee for inaccurate programming information submitted in a license renewal application he had signed, even though the figures had been prepared by a consultant. Disqualification was warranted because the licensee "did not make even the most

perfunctory effort to ascertain the accuracy of the figures supplied by his broadcast consultant." Id. at 1101. Moreover, the licensee had only recently acknowledged similar mistakes in another proceeding and "promised to do better in the future." Id. at 1106. Under these circumstances, his carelessness was so "wanton, gross, and callous" as to be "equivalent to an affirmative and deliberate intent." Id.

714. The very same circumstances are present here. Statements in Exhibit 1 were in fact false. Although George Gardner did not prepare the statements, he made no effort to ascertain the facts before he signed the applications -- despite having promised after adverse candor findings in another proceeding that he would henceforth "carefully review any...applications and statements to ensure that they fully and accurately disclose any pertinent facts." Thus, as in Golden Broadcasting, Gardner's gross carelessness (even if that were all it was) is tantamount to deliberate intent, for which Gardner must be disqualified.[112/]

112/ This conclusion is not altered by the Commission's holding in Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983), that intent to deceive is a necessary element of misrepresentation or lack of candor. Golden Broadcasting holds that in some circumstances gross disregard for accuracy and truth equals intent to deceive and calls for the same sanction. This is fully consistent with the Commission's character policy, which is concerned with the reliability as well as the truthfulness of applicants and licensees. Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1190 (1986) ("Character Policy Statement").

(3) Gardner Is Accountable for Subordinates' Misconduct

715. Quite apart from his personal culpability, George Gardner is also accountable for the disqualifying misconduct of his subordinates. As the sole voting owner of Raystay, Gardner controlled the corporate permittee of the LPTV permits. Commission policy holds that "a corporation must be responsible for the FCC-related misconduct occasioned by the actions of its employees in the course of their broadcast employment." Character Policy Statement, supra, 102 FCC 2d at 1218. Thus, the Commission has imposed disqualification for serious misconduct of subordinates even where the principal(s) professed lack of knowledge. Continental Broadcasting, Inc., 17 FCC 2d 485, 486-87 (1969) (licensee disqualified for misrepresentations and fraud practiced upon Commission by station manager even though manager had withheld facts from licensee's principals); Radio Carrollton, 69 FCC 2d 1141-44 (1978) (licensee disqualified because of false affidavit and false testimony given in FCC proceeding by licensee's officer/employee); Prattville Broadcasting Co., 4 FCC 2d 555, 563 (Rev. Bd. 1966) (applicant would be disqualified for falsified submissions to FCC prepared by subordinate even assuming principal had no actual knowledge of falsification); United Broadcasting Co. of Florida, Inc., 60 FCC 2d 816, 817 (1976) (Commission disqualifies licensee for fraudulent billing, saying, "a licensee will be held culpable not only when it intentionally participates in a fraudulent billing scheme, but also when it abandons its supervisory

responsibility in this sensitive area and creates conditions which permit or encourage fraud to go forward").

716. If George Gardner did not know that the claims of "lease negotiations" and site visits were false, David Gardner did. Hence, the claims were knowing misrepresentations by the employee whom George Gardner had assigned to prepare Raystay's FCC filings (Tr. 4547-48). Moreover, David Gardner was a long-time management employee (and former officer) who had been intimately involved in this family business for many years. (Tr. 4538-39, 4544, 4553-55.) Although George Gardner had complete control of the business and actively ran the company, he did nothing to verify Exhibit 1 before he signed it. Nor, obviously, had he set the proper moral tone within the company, by direction or personal example, to ensure that his subordinates would be thoroughly honest with the Commission at all times. For all those reasons, George Gardner is fully answerable under Commission policy for the misrepresentations that David Gardner prepared.

(4) Aggravating Circumstances: "Heightened Scrutiny" and the Compliance Pledge

717. The aggravating circumstances under which this misconduct occurred remove any doubt that George Gardner must be disqualified. In February 1990 the Commission formally placed Gardner under "heightened scrutiny" because of adverse candor findings made against him in the RKO Fort Lauderdale proceeding.

When the Mass Media Bureau granted Raystay's LPTV applications in July 1990, it stressed that Gardner would remain under "heightened scrutiny." This probationary status was still in effect, therefore, when Gardner reviewed and signed the false and misleading LPTV extension applications in December 1991 and July 1992. Indeed, that misconduct involved the very FCC authorizations whose original grant in July 1990 had been made subject to continued "heightened scrutiny."

718. The Commission attributes added significance to misconduct occurring after a licensee is already on notice of probation, because misconduct in those circumstances indicates particular irresponsibility and raises serious doubt about future compliance. That policy has been expressed in several cases resulting in either disqualification or designation for hearing. For example, in Star Stations of Indiana, Inc., 51 FCC 2d 95, 97 (1975) (emphasis added), the Commission stated --

> "[M]uch of the serious misconduct which has occurred at WIFE took place while Star was on notice, by virtue of the probationary grant of renewals, that its operation would be under close scrutiny by the Commission. The significance of the misconduct established on this record must be viewed against this background. Also, this circumstance must be given substantial weight when the Commission considers the likelihood of future compliance by Star Stations."

In WMJX, Inc., 85 FCC 2d 251, 275 (1981) (emphasis added), the Commission noted that --

> "The fact that the improprieties occurred only several months after WMJX, Inc., had been warned about station misconduct in the 'Magnum One' contest and then continued after the licensee received notice, as a result of two Commission investigations, that deceptive

> broadcasts would be the subject of inquiry, indicates a complete unwillingness to fulfill its licensee responsibilities and protect the public from contest irregularities."

In Folkways Broadcasting Co., Inc., 48 FCC 2d 723, 733 (Rev. Bd. 1974) (emphasis added), the Review Board stated in words directly applicable to George Gardner here --

> "Crowder misrepresented certain facts to the Commission in this proceeding...and, thus, has again engaged in the same type of conduct which led to his disqualification in the prior trafficking case. This record has a significant bearing on what can be expected of Crowder in the future and, in our view, does not permit a conclusion that Crowder may now be safely entrusted with the duties and responsibilities of a broadcast licensee."

719. Here, while formally under "heightened scrutiny" for adjudicated dishonesty in Fort Lauderdale about his divestiture intentions, George Gardner promptly foisted another deception on the Commission, this time about his LPTV construction intentions. By committing the same misconduct for which he had only recently been placed on probation -- misconduct committed after he received those very permits with an express warning that "heightened scrutiny" would continue -- Gardner has shown that he cannot be trusted in the future.

720. This conclusion is reinforced by a second important aggravating circumstance. After George Gardner was placed under "heightened scrutiny," and in order to secure a grant of his LPTV construction permits, he formally pledged to the Commission that henceforth he would "carefully review any...applications and statements to ensure that they fully and accurately disclose

any pertinent facts." (TBF Ex. 258, p. 3.) That pledge was an essential reason why the Commission granted his LPTV construction permit applications. (TBF Ex. 260, p. 2.) The Commission was entitled to rely on that pledge when it reviewed his statements in Exhibit 1 of the LPTV extension applications.

721. The record now shows that Gardner flagrantly violated his pledge by submitting a total of eight extension applications that did not by any means "fully and accurately disclose" all "pertinent facts." The Character Policy Statement provides that in assessing the sanction to be imposed when misconduct is found, "the applicant's record of compliance with [FCC] rules and policies, if any, should ordinarily be taken into account." 102 FCC 2d at 1228. This factor is relevant to the character trait of reliability, and "reliability includes the propensity to act consistent with one's representations." Id. at 1195.

722. Gardner's violation of his full disclosure pledge belies any notion that he will "act consistent with [his] representations." This weighs strongly for disqualification as the appropriate sanction for the misconduct of which he and Raystay are guilty under the designated issue. Golden Broadcasting Systems, Inc., supra, 68 FCC 2d at 1108.[113/]

[113/] In disqualifying the licensee in Golden Broadcasting, the Commission said the following, which pertains equally to George Gardner here: "[W]e conclude that Parker has shown a propensity for submitting false information in official documents to the Commission. We conclude further that he continued to disregard his affirmative obligation to ascertain the accuracy and truth (continued...)

723. In sum, the misrepresentations and lack of candor in Raystay's 1991 and 1992 LPTV extension applications require under all the circumstances that George Gardner be disqualified and that Glendale's application be denied.

2. Raystay's Red Lion/York Assignment Application

724. George Gardner must be disqualified not only because he and Raystay made false and misleading statements in eight separate LPTV extension applications, but also because Raystay misrepresented facts and lacked candor in the expense certification it filed with the Red Lion assignment application. Raystay falsely represented that the legal and engineering expenses listed in its certification had been incurred exclusively in connection with the Red Lion permit when, in fact, they had not. Instead, the figures were derived through two allocation "theories" which were intended to produce a total cost figure that would justify the $10,000 sale price the buyer was willing to pay for the permit. Moreover, Raystay lacked candor by not telling the Commission that multiple permits were involved, and

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113/ (...continued)
of the statements he made in license renewal applications to the Commission, even after he participated in hearings which brought out keenly that his knowledge of the operation of KOAD was seriously lacking and after he was apprised of his obligations as a licensee. In fact, in pleadings submitted upon completion of the first hearing, Golden maintained that Parker understood his obligations and would not repeat his mistakes again. Based in part on that promise, the ALJ recommended renewal. By the time the Initial Decision was released, however, Parker had already again submitted false information in an official document to the Commission." 68 FCC 2d at 1108 (emphasis added).

that the claimed costs were really the product of an allocation. By withholding that fact, Raystay was able to induce the Commission to approve the full $10,000 sale price without further scrutiny of its expense figures, which it knew could not be attributed solely to the Red Lion permit. Through this artifice, Raystay reaped more than twice the lawful amount, making over $5,000 in illegal profit on the sale of its construction permit.

a. The Unbuilt Station/No-Profit Rule

725. Construction permits are granted "only to qualified applicants who have the capacity and bona fide intention to construct the proposed facility and to render broadcast service." Urban Telecommunications Corp., 7 FCC Rcd 3867, 3870, (1992); Scott & Davis Enterprises, Inc., 54 RR 2d 868, 869 (1983); Calhoun County Broadcasting, Co., 57 RR 2d 641, 646 (1985). The Commission has implemented this policy with rules that strictly prohibit the sale of unbuilt construction permits for profit. Thus, an unbuilt construction permit may not be sold for a sum --

> "in excess of the aggregate amount clearly shown to have been legitimately and prudently expended.... by the seller, solely for preparing, filing, and advocating the grant of the construction permit for the station, and for other steps reasonably necessary toward placing the station in operation." 47 C.F.R. §73.3597(c)(2). (Emphasis added.)[114/]

[114/] Section 73.3597 of the Rules is expressly made applicable to low power television stations by Section 74.780 of the Rules. 47 C.F.R. §74.780.

726. To enforce this regulation, the Commission requires that when the seller of an unbuilt construction permit is to be paid its expenses --

> "the applications of the parties shall include an itemized accounting of such expenses, together with such factual information as the parties rely upon for the requisite showing that those expenses represent legitimate and prudent outlays made solely for the purposes allowable under paragraph (c)(2) of this section." 47 C.F.R. §73.3597(c)(3)(ii).

These requirements are similar to those in 47 C.F.R. §73.3525, which limits settlement payments in comparative cases to the applicant's legitimate and prudent out-of-pocket expenses, and likewise requires itemized accountings to document those expenses. 47 C.F.R. §73.3525. Both "no-profit" rules serve to "maintain the integrity of the Commission's licensing processes" by prohibiting the use of permits and applications to reap financial gain. Compare, Amendment of §73.3597 of the Commission's Rules, 52 RR 2d 1081 (1982), on recon., 99 FCC 2d 971 (1985), with Comparative Broadcast Proceedings, 6 FCC Rcd 85 (1990), on recon., 6 FCC Rcd 2901 (1991). When the Commission established the low power television service in 1982, it expressly warned that its no-profit limitation would be "strictly applied in the low power context." The Commission noted that "[a]llowing profit to be obtained upon the transfer of a construction permit prior to commencement test operations" would violate Sections 301 and 304 of the Communications Act, which provide that a broadcast license conveys no property interests.

Report and Order (Low Power Television Service), 51 RR 2d 476, 517 (1982).

727. When an applicant seeks to sell an unbuilt construction permit or dismiss a comparative application for consideration, the Commission will examine the applicant's itemized accounting to determine whether the consideration exceeds the applicant's legitimate and prudent expenses. If the Commission determines that expenses have been overstated, it will disapprove the transaction or otherwise reduce the amount that may be reimbursed. See, Horseshoe Bay Centex Broadcasting Co., 5 FCC Rcd 7125, 7128 (1990) (disapproving payment under a consulting agreement that would have exceeded the applicant's out-of-pocket expenses). Likewise, if a claimed expense was not in fact incurred for an allowable purpose solely in connection with the station in question, the Commission will disallow that expense. See, Community Telecasters of Cleveland, Inc., 43 FCC 2d 540, 542-43 (1973) (disapproving expenses that did not relate "to any specific activities performed in connection with the prosecution of the assignor's application ... or placing the station in operation"); TVue Associates, Inc., 5 FCC 2d 421, 422 (1966) (denying expenses that were not related solely to the applicant's prosecution of its application); Integrated Communication Systems, Inc., of Massachusetts, 5 RR 2d 725, 728 (Rev. Bd. 1965) ("the showing before us does not relate the administrative services for which the charges have been made to the Boston television application"); see also, Dirigo Broadcasting, Inc.,

4 RR 2d 273, 276 (Rev. Bd. 1965) ("the expenses incurred in prosecuting Dirigo's application were not clearly segregated from those incurred by it in its successful effort to have the channel allocated").

728. Thus, to recover the full $10,000 that Grolman was willing to pay for the Red Lion permit, Raystay needed to convey the impression that the legal and engineering costs listed in its expense certification related specifically to that permit. Toward that end, Raystay certified (a) that David Gardner was familiar with the expenses Raystay had incurred "in obtaining the construction permit being assigned," and (b) that those expenses, which were listed to the precise dollar, were actually reflected in the certification. Both representations were false.

729. David Gardner was <u>not</u> familiar with the figures listed in the Red Lion expense certification. Those figures had been given to him only days before he signed the certification; he had neither seen nor discussed them with anyone before then, and he had made no effort to compare them against the source documentation that he had on hand. (¶426 above.) Thus, Raystay could not in good faith represent that Gardner was personally familiar with the costs of the Red Lion permit. Raystay's plain motive for suggesting otherwise was to create the false impression that David Gardner, as a member of Raystay's management,

could verify the accuracy of the figures presented, which he absolutely could not.

730. Moreover, the legal and engineering figures that were precisely listed in Raystay's certification did not reflect the actual costs of the Red Lion permit. To the contrary, those figures were derived through allocations designed to yield an aggregate expense figure in excess of the $10,000 sale price. Morton Berfield attributed to the Red Lion permit 50% of the total legal fees for all five of the LPTV permits, even though virtually none of those fees could be attributed specifically to the Red Lion permit. (¶¶408-414 above.) In fact, some of those fees could not be attributed to Raystay's LPTV construction permits at all. (¶413 above.) Furthermore, he allocated to Red Lion one-third of Raystay's total engineering costs for all five permits, even though both he and David Gardner had reviewed Hoover's invoice, which plainly reflected that Hoover had charged one-fifth, not one-third, of the total engineering fees to each application.[115/] Earlier, Sandifer had discussed with

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[115/] Berfield had no basis for disregarding the one-fifth allocation shown on the face of Hoover's invoice. In the absence of information from Hoover to the contrary, which Berfield concedes he did not have and made no effort to obtain (¶417 above), it must be presumed that the invoice properly depicted how Hoover actually apportioned his charges. Otherwise, an applicant could readily circumvent the Commission's no-profit rule by claiming expenses based on its mere supposition of what a vendor's charges "could" or "should" have been rather than what they actually were as reflected by the vendor's invoice. In any event, Berfield has admitted that his one-third allocation was wrong, claiming that he would have divided Hoover's fees by one-fifth if he had seen Hoover's invoice. (continued...)